

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF FLORIDA  
PENSACOLA DIVISION**

In re:

POINTE ONE, LLC,

Debtor.

CASE NO.: 10-30741-KKS

Chapter: 7

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**ORDER DENYING APPLICATION OF GALIC-POINTE, LLC FOR ALLOWANCE  
AND PAYMENT OF AN ADMINISTRATIVE CLAIM (Doc. 287)**

THIS MATTER came before the Court for hearing on July 26, 2012 upon GALIC-Pointe, LLC's ("GALIC") Application for Allowance and Payment of an Administrative Claim (the "Application") (Doc. 287) filed on June 14, 2012. In the Application, GALIC seeks a super priority administrative claim under 11 U.S.C. § 507(b) for alleged failure of adequate protection during the Chapter 11 case. Objections to the Application were filed by the attorney for the Debtor, and by Creditors Pointe Mezzanine, LLC and Burke Blue Hutchinson Walters & Smith, P.A. The Court took the matter under advisement and issued an oral ruling on September 18, 2012.

*Factual Background*

Pointe One, LLC (the "Debtor") filed its Chapter 11 petition on April 14, 2010; the case was converted to a Chapter 7 on the Debtor's motion on March 27, 2012. Prior to and during the case the Debtor owned two parcels of real property, both of which were effectively undeveloped and vacant, commonly referred to as the "Condominium Parcel" and the "Marina Parcel." GALIC's claim is secured by a mortgage on the property known as the "Condominium Parcel" and had been reduced to a final judgment in the amount of \$8,720,903.75.

The Debtor designated itself as a "single asset real estate entity" in its initial Schedules; no party ever disputed this designation and GALIC relied upon this designation in its

Application.<sup>1</sup> During the Chapter 11, with the Court's approval and no objection by GALIC, the Debtor borrowed money from a third party in order to make monthly payments to GALIC. The monthly payments were in an amount stipulated to by GALIC and the Debtor calculated by the amount of the judgment at a non-default rate of interest. At no time did GALIC file a motion seeking stay relief or adequate protection during the Chapter 11. Before filing its Application, GALIC did not mention in any pleadings, either directly or indirectly, its intention to assert an administrative expense claim. GALIC continued to accept the interest-based payments until the Debtor filed its motion to convert the case to a Chapter 7, after which GALIC sought stay relief. The Debtor maintains that it had no alternative but to make monthly interest-based payments to GALIC, or file a plan within 90 days, so that GALIC would not be automatically entitled to stay relief pursuant to 11 U.S.C. § 362(d)(3).

GALIC asserts that the interest-based payments the Debtor was making to it during the Chapter 11 constituted adequate protection payments under 11 U.S.C. § 362(d)(1) or (d)(2), and that the value of the property securing its claim decreased significantly during the Chapter 11. In its Application, GALIC asks this Court to award it a super priority administrative claim under 11 U.S.C. § 507(b) for over \$2 million, which it says is equal to the alleged difference between the amount of its judgment claim and the current value of the property, which the parties agree is about \$6 million. GALIC argues that the monthly payments the Debtor was making, which GALIC categorizes as "adequate protection" were inadequate and did not protect it against the alleged diminution in value of the Condominium Parcel during the pendency of the Chapter 11 case.

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<sup>1</sup> Bankruptcy Code Section 101(51B) defines "single asset real estate" as:

[R]eal property constituting a single property a single property or project, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor who is not a family farmer and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto.

11 U.S.C. § 101(51B). No party ever objected to the Debtor categorizing itself as a single asset real estate entity and the Court's ruling is thus based on this as an undisputed fact.

### *Discussion*

The issue is whether the payments that were being made to GALIC under § 362(d)(3) constituted “adequate protection.” If the payments constituted adequate protection, it is possible that GALIC could be entitled to a claim under § 507(b) of the Code; if the payments did not constitute adequate protection, § 507(b) is inapplicable.

There is very little legislative history on § 363(d)(3), which applies only to single-asset real estate cases. Section 362(d)(3) provides that on the request of a party in interest, the court *shall* grant relief from the stay:

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later –

(A) The debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) The debtor has commenced monthly payments that –

- (i) may, in the debtor’s sole discretion, notwithstanding section 363(c)(2), be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and
- (ii) are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor’s interest in the real estate...

11 U.S.C. § 362(d)(3) (emphasis added). Case law reveals that payments to a creditor during the pendency of a Chapter 11 case, such as were made here, under § 363(d)(3) are designed to compensate that creditor for the time value of money. *See In re Heather Apartments Limited Partnership*, 366 B.R. 45, 50 (Bankr. D. Minn. 2007); *see also In re Hope Plantation Grp., LLC*, 393 B.R. 98, 101-02 (Bankr. D.S.C. 2007) *and In re South Side House, LLC*, 2012 WL 2254212 (Bankr. E.D.N.Y. 2012). The reasoning is that if the Debtor does not file a plan within 90 days

and does not start making monthly interest payments to the creditor, then the creditor should be allowed to enforce its mortgage or lien rights; that is why this Code section says “shall” grant relief from the stay unless .... In this case, the Debtor had only two options if it didn’t want GALIC to be entitled to automatic stay relief: either file a plan within ninety days, which the Debtor did not do, or make monthly payments, which the Debtor here did.

GALIC contends that it was “prevented” by operation of the automatic stay and by the payments the Debtor was making “from exercising its legal remedies as against the condominium parcel.” Doc. No. 299.<sup>2</sup> This assertion is not legally accurate. The fact that payments were being made during the pendency of the Chapter 11 did not in any way prevent GALIC from seeking stay relief or adequate protection. GALIC could have filed a motion for either at any time during the Chapter 11 case. Neither §362(d)(3) nor the other subsections of Section 362 of the Code prohibit a creditor from seeking additional relief even if a debtor is making payments pursuant to § 362(d)(3).

In *In re Duvar Apt, Inc. v. FDIC*, 205 B.R. 196, (9<sup>th</sup> Cir. BAP 1996), the debtor, essentially making the same argument as GALIC makes here, argued that § 362(d)(3) preempts the remainder of § 362(d). The court disagreed, and noted:

It seems clear that although subsection (3) addresses the specific situation of single asset real estate cases, subsections (1) and (2) apply in those cases as well. A bankruptcy court has authority to grant relief from the stay for cause in a single asset real estate case before the expiration of § 362(d)(3)’s ninety day period.

*Id.* at 200.<sup>3</sup> Of course, it goes without saying that the court has jurisdiction to grant relief from the stay for cause at any time, within or beyond the 90 day period. *See In re Hope*

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<sup>2</sup> GALIC contends that the Debtor “[t]o avoid losing the protection of the automatic stay and indeed, to statutorily preclude GALIC from having the right to terminate, annul, modify or condition the automatic stay . . . made monthly adequate protection payments to GALIC.” (Doc. No. 299, pg. 6).

<sup>3</sup> *Duvar* was decided when the Code included an “or” between sections 362(d)(1), (2) and (3). Although, the “or” no longer appears in the statute, the “or” was not dispositive to the issue in *Duvar*. The court also relied on the following language in *Collier on Bankruptcy*:

*Plantation Grp., LLC*, 393 B.R. at 103 n.6.

GALIC further asserts that it was harmed during the Chapter 11 case by the Debtor's failure to pay real estate taxes. Once again, this is a harm that GALIC might have averted during the case by taking some action. It is not uncommon for a creditor to seek entry of an order requiring, as adequate protection, the debtor to make real estate tax payments during the pendency of a Chapter 11. GALIC neither sought nor obtained such relief, notwithstanding the fact that as of the petition date the Debtor had not made any real estate tax payments since approximately 2008. By not bringing this fact up until filing its Application, GALIC ran the risk that accrual of taxes might result in erosion of equity in the property securing its claim. Nothing in § 362(d)(3) prevented GALIC from seeking an order requiring the Debtor to pay post-petition real property taxes as a form of adequate protection.

Adequate protection is designed to protect the creditor when the automatic stay prevents the creditor from foreclosing but the value of its collateral is diminishing. *See In re Scopac*, 624 F.3d 274, 278 (5<sup>th</sup> Cir. 2010) (noting that adequate protection is a term of art in bankruptcy and “is a payment, replacement lien or other relief sufficient to protect the creditor against diminution in the value of his collateral during the bankruptcy.”). Cases construing the term “adequate protection,” most notably the Eleventh Circuit case of *In re Carpet Center Leasing Co, Inc.*, 991 F.2d 682, 278 n. 1 (11th Cir. 1993), almost invariably involve some type of

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The court will not, of course, be precluded from granting relief under section 362(d)(1) or (2) where it is appropriate to do so even where the 90 days of section 362(d)(3) have not run. *In re Duvar Apt., Inc.*, 205 B.R. 196, 200 (9<sup>th</sup> Cir. BAP 1996) (quoting 2 Lawrence P. King, *Collier on Bankruptcy* ¶ 362.07 at 362-74 (15<sup>th</sup> ed. 1996). A similar sentence still appears in the current edition of *Collier on Bankruptcy*, “[t]he court may, of course, grant relief under subsection 362(d)(1) or (2) where it is appropriate to do so even if the applicable time period in subsection (d)(3) has not run.” 3 *Collier On Bankruptcy* ¶ 362.07[5][b] (16<sup>th</sup> ed. 2012).

depreciating collateral.<sup>4</sup> Here, there was no depreciating collateral; instead there was vacant, undeveloped land.<sup>5</sup>

GALIC's claim that the condominium parcel lost value during the Chapter 11 is not supported by the facts or evidence. GALIC rests this argument on the Schedule A filed by the Debtor listing this parcel at being worth approximately \$13 million, and on the Debtor's Disclosure Statement (filed months later), stating the appraised value at slightly more than \$10 million. According to GALIC, because the parties now agree that this parcel is worth only about \$6 million that proves that the value declined during the pendency of this case. CabnThis argument must also fail. At no time during this case did either party move to value the condominium parcel or introduce evidence of that property's value. GALIC's election not to contest the Debtor's representations of value during the Chapter 11 case was strategic, and appears to have been based upon the hope that the Debtor could successfully reorganize and pay GALIC's claim in full. That strategy choice does not elevate the Debtor's representations of value in its Schedules and pleadings to "evidence" sufficient to support a claim such as GALIC is making here.

Regardless, the issue of value would only be material if the payments that were made during the case constituted adequate protection. Because the payments were made under § 362(d)(3) of the Code, and were not made or awarded under § 362(d)(1) or (2), the issue of value is not relevant.

In a case with somewhat similar facts, the bankruptcy court held § 362(d)(3) payments were not tied to the value of the collateral but were instead intended to protect the secured creditor's time value of money. *In re Heather Apartments Ltd. P'ship*, 366 B.R. 45 (Bankr. D.

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<sup>4</sup> *In re Carpet Center Leasing Co, Inc.*, 991 F.2d 682, (11th Cir. 1993) involved a fleet of twenty six tractors. See also *In re Advisory Info. & Mgmt. Sys., Inc.*, 50 B.R. 627 (Bankr. Tenn. 1985) (involving equipment).

<sup>5</sup> The Debtor asserts that not only did the value of the property not decline during the case, it may have increased.

Minn. 2007). The court stated, “[W]here the case does not early kick forward toward confirmation, a debtor must compensate its mortgagee for the time-value of the mortgagee’s debt investment, by the payment of interest at the original contractual rate.” *Id.* at 50. That court further held that the § 362(d)(3) payments are not designed to be adequate protection to protect the secured creditor in the event that the value of the collateral should deteriorate during the pendency of the case. “[T]he focus is entirely on an *in-hand realization of cash* by the creditor, *during the pendency of the case*, while the property remains in the debtor’s hands.” *Id.* at 51 (emphasis included). The court in *Heather Apartments* recognized that the focus of Sections 362(d)(1) and (2) is much more broad than Section 362(d)(3): under 362(d)(1) and (2) the concern is the existence of “substantial equity in pledged collateral” and the “protection of a mortgagee’s financial interests while the automatic stay prevents it from foreclosing.” *Id.*

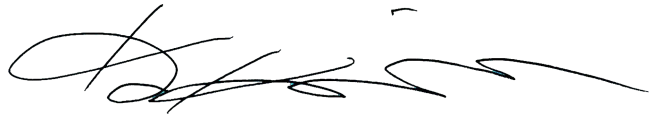
The payments the Debtor made to GALIC in this case were payments under § 362(d)(3) of the Code. These payments were not adequate protection payments, but rather were payments designed to compensate GALIC for the time value of its “debt investment.” *Id.* at 50. In order to prevent GALIC from being entitled to stay relief the Debtor had two choices: file a plan within ninety days pursuant to § 362(d)(3)(A) or begin making monthly payments under § 362(d)(3)(B)(ii); it chose to make the payments. There was nothing to prevent GALIC from seeking relief from the automatic stay or adequate protection under §362(d)(1) or (d)(2).<sup>6</sup> For the reasons set forth above, and based upon the Application, Objections, the Record and argument of counsel, it is:

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<sup>6</sup> The Court agrees with GALIC that the fact that it may have acquired Regions Bank’s claim for less than its face value is irrelevant in determining GALIC’s rights in this case.

ORDERED and ADJUDGED that GALIC's Application for Allowance and Payment of an Administrative Claim is DENIED.

DONE and ORDERED in Tallahassee, Florida this November 16, 2012.

A handwritten signature in black ink, appearing to read 'K. Specie', written over a horizontal line.

KAREN K. SPECIE  
United States Bankruptcy Judge

Copies to: All creditors and parties in interest